

Law Schools and the Impoverished View of Free Speech

by Bruce P. Frohnen

The Indispensable Right: Free Speech in an Age of Rage, Jonathan Turley, Simon and Schuster, 2024, pp. 432, \$15.49 hardcover.

Lawless: The Miseducation of America's Elites, Ilya Shapiro, Broadside Book, 2025, pp. 272, \$22.42 hardcover.

C OVID. Climate Change. DEI. For years, these have been subjects of intense political debate. Unfortunately, they also have been subjects of intense censorship on and off American campuses. Two recent books by broadly libertarian lawyers—Jonathan Turley’s *The Indispensable Right* and Ilya Shapiro’s *Lawless*—seek to explain what Turley calls the “alliance of academic, media, and corporate interests with the government” which has “created an existential threat” to free speech.

Turley provides a history of recurring crackdowns on speech, from prosecution of political opponents for “sedition” going back to the founding era,

to long prison sentences imposed on anti-war activists during both World Wars, to formal and informal attacks on people accused of communist sympathies, civil rights leaders, and anyone vaguely associated with the January 6, 2021 riot at the Capitol Building. Shapiro also concentrates on threats to free speech, focusing on his own travails with cancel mobs and a mendacious, radicalized administration at Georgetown’s Law School. Woke mobs pounced on Shapiro’s mildly awkward phrasing in a “late-night hot take on Twitter” regarding Joe Biden’s determination to appoint a black woman to the first open position on the Supreme Court during his administration. As a

result, he was forced to walk away from a plum job and barely escaped full cancellation.

Both authors provide a similar critique of elite aversion to free speech and the exchange of ideas proper to public and especially campus discourse. Shapiro then argues for a set of policies that can, and in many institutions has, prevented the deplatforming, cancellation, and inquisitorial abuses that mar our educational system. The solution begins, he notes, with elimination of diversity bureaucracies and the programs they use to impose their destructive equity-based ideology, as well as the race- and sex-based preferences that continually restock their membership. These policies also would include requiring institutional neutrality on political and social controversies, basing hiring and promotion on achievement and merit rather than viewpoint or ideology, and supporting principles of free speech guaranteeing all members of the university community “the broadest possible latitude to speak, write, listen, challenge, and learn.”

Turley goes deeper, analyzing the roots of speech suppression in the U.S. as the product of panic, fear, and rage among speakers and especially among elites seeking to tamp down disruptions arising from disfavored points of view. His argument is rooted in John Stuart Mill’s assertion of natural rights, along with a bit of more traditional natural law thinking rooted in each person’s inherent human dignity. The result is attractive but rather thin, focusing on self-expression and individual autono-

my as inherent, absolute goods untethered from the pursuit of objective truth and the virtues necessary for self-government. Such a thin conception of the good of autonomy is at the root of Mill’s own philosophical weaknesses, born out in his advocating a kind of libertarian socialism for advanced societies and a harsh colonialism for native peoples’ “own good” as they are “civilized” through authoritarian liberalism.

It may seem ironic that these socialist, authoritarian tendencies (dealt with most effectively in Joseph Hamburger’s classic book, *John Stuart Mill on Liberty and Control*—1999) grew from a radical libertarian perspective on authenticity and related rights, but examples abound. Perhaps most telling, public schools have encouraged adolescent gender “transitioning” on the grounds that mental health requires sexual “authenticity” divorced from biological fact, and kept their actions secret from parents so that confused children might be “free” to commit irreversible self-harm without parental guidance. Officials who prioritize radical individual autonomy thus undermine both open debate and the biological and cultural context within which children can learn to be healthy, autonomous adults. Autonomy itself, for Mill the real goal of free speech, is reduced to actions based on impulses, however irrational their sources. Nothing coherent and healthy can come of such a twisted calculus.

Turley denies that free speech should be seen as existing for any purpose other than itself. This is an analytic non-starter because, as Aristotle was far

from alone in pointing out, the goods of life are good because, or to the extent, they serve higher goods, the highest in this world being happiness, which is a life lived through virtuous activity. There is great room, especially among a free people, for debate over what constitutes virtuous activity and what is necessary to pursue it. That said, attempts to separate the act of speaking from its content and intent merely leaves it open to manipulation by those who seek to replace goods bound up with ordered liberty with radical, ideological goals aimed, not at understanding, but at reshaping our society, our virtues, and our very nature.

Free speech is actually something more than an intrinsic good: it is an integral part of a *good life*. Even Mill recognized this, though his good life was a thin one dominated by individual, autonomous actions, and he was willing to violate his principles to empower “enlightened” elites who (like administrators and other activists today) would “make” us free. Unfortunately, Mill’s autonomy is limited principally by the judgment of entrenched elites and by a less-than-coherent “harm principle” that allows one to swing one’s fist right up to another person’s nose; such threatening behavior, especially if accompanied by hostile or threatening speech, is sometimes, properly, prosecuted as assault.

People of differing political views and backgrounds, sharing commitment to open discourse and pursuit of the truth, can see the centrality of free speech in any good life. But lawyers

especially should recognize that the issues involved are at least as philosophical and cultural as they are legal and constitutional. Especially under a free Constitution, speech (and “expression”) has intrinsic bounds arising, for example, from the duty to discourage very real harms like libel, slander, and fraud.

Lawyers also should understand further complications to our commitment to open discourse presented by the problem of contract and the crucial rights of the various associations through which we build meaningful lives. Non-disclosure and non-disparagement agreements are facts of life in settling various disputes. Moreover, universities, like other corporate persons with their own common goals, inescapably exercise rights which impede certain forms of expression by individual members (trade secrets, anyone? Ground rules for productive debate?) in the interests of common goals. This does not mean that there is no role for lawyers to play in protecting, for example, the rights of professors and students in dealing with university censorship. Constitutional and statutory rights and limits on governmental and institutional power in quelling speech remain important. But they must be engaged as part of a larger struggle to articulate and put into action a properly grounded vision of the purpose of the university and of public discourse more generally, rooted in our culture and traditions, and not merely current, corrupted theories of law.

All associations, even universities, must limit expression—especially to prevent riots, deplatforming, and other

“expressive” acts aimed at suppressing opposition. We also limit expression to protect children from obscene acts in the public sphere. Such limits arise from the same understanding of the good life that traditionally has undergirded free speech in America: the requirements of peaceful dialog and ordered liberty. The “Chicago Trifecta” of open discourse policies Shapiro describes arises from a specific picture of the good served by the university. That good is tied up with the kind of character Americans historically sought to nurture: courageous in the face of opposition, resilient under duress, open to differing ideas, committed to the pursuit of truth, and possessed of the common sense necessary to distinguish good faith debate from bad faith assault on genuine human dignity in pursuit of unquestioned power.

Unfortunately, bad faith has swamped our universities. In the name of freedom, woke elites and their student/activist shock troops suppress genuine pursuit of the truth. But the woke era did not come from nowhere and lawyers have done more than their share to bring it about.

Shapiro writes mostly about elite law schools because, he says, they constitute the environment in which he has operated throughout his career and exercise an outsized influence on public life. Given this, one wishes he had discussed the corrupt and corrupting origins of elite lawyers’ power going back to the late nineteenth century. The outsized influence of national elites, in law and academia especially, is neither

natural nor necessary. It stems from the unconstitutional growth of the national administrative state and widespread, government-backed attacks on local markets, cultural institutions, and self-government, culminating in the concentration of unparalleled power in a tiny number of until now self-perpetuating, culturally isolated institutions.

Crucially, these include educational institutions now divorced from their own communities as they seek national and international influence and prestige. Legal doctrines twisting our common understandings of rights, of the importance of local self-government, and of the limits of federal power, combined to make these assaults on ordered liberty possible and effective.

Shapiro’s lack of interest in such issues is matched by his oddly sanguine take on the ideological uniformity of elite schools. He claims to have no real problem with the overwhelming dominance of leftist faculty at these institutions. He goes so far as to say that the on-campus and broader legal atmosphere was sufficiently open until “about a decade ago.” The lack of historical context, here, is troubling. The massive movement through affirmative action and earlier “diversity” programs to impose political correctness as a means of driving conservative students and faculty off campus was a major cause of the current atmosphere and power imbalance, as well as its weaponization of racial and sexual classifications.

The myopic claim that lawyers must “do better because we run the country” is common at law school. It is

also wrong-headed. Were our culture healthier, lawyers and their institutions would be doing far less, and far more quietly.

Turley's also is a lawyer's take on free speech, in his case playing out the trope of lawyers as guardians of individual liberty, who betray their vocation when they stand with "the powerful" against supposedly anti-establishment voices, regardless of their intentions. It is important to note, in this context, that lawyers, especially "progressive" lawyers who have twisted the law and the fundamental meaning of civil rights, are the group most responsible for the rise of woke politics and the reign of DEI. Perhaps even more important, the law schools that produced these lawyers have corrupted, not just their students, but the culture on which free speech and self-government rely.

The problem is not that Turley or Shapiro don't believe in free speech, or that free speech is not essential in a free, constitutional republic. The problem is that both authors overlook the role played by educational corruption in producing authoritarian institutions, beliefs, and practices—especially on university campuses. I'm not sure of how much exposure either Turley or Shapiro has had to the ideals or practices of the university. That said, having served on faculties at both universities and law schools, I can attest to the fact that the presumptions of liberal arts universities are quite different from those of law schools. While most universities these days show little evidence of it, their putative purpose remains the

search for truth and virtuous citizenship. For law schools, those goals are, by design, essentially non-existent.

Universities include many departments devoted to the study of many subjects, including law (usually in the political science or history department). Today's multiversity, with its myriad professional schools, includes much teaching that rejects the pursuit of truth and virtue so central to the university's intrinsic mission and so derided by progressives and devotees of "practical" education. Sadly, our law schools provide a prime example of how the pursuit of "professional" skills and credentials undermines genuine education.

Legal education in America began as simple apprenticeship. Young lawyers with talent and/or money often paid to work under established attorneys, learning the forms of legal action, researching the nuances of maxims or principles of our common law, and practicing the integration of the truths and means of investigation learned at universities and through independent reading with the requirements and habits of legal practice. This was sufficient for lawyers like John Adams and Thomas Jefferson because the university taught them the great tradition of normative thought and action that some called natural law and others mere common sense. Some of our greatest Presidents—not just Adams and Jefferson, but Lincoln and, well into the twentieth century, Calvin Coolidge, were lawyers who never went to law school. Lawyers received their humane education either at a university or through more generalized immersion

in Western traditions. Only afterward did they learn the law, and then principally in the doing.

While more-or-less formal law schooling began in the early republic, it was not until the late-nineteenth century that law school became central to legal practice. And it did so with the purpose of undermining the common understandings on which our culture and, from it, our legal traditions were based. This was when the drive to replace common law with a series of law codes like that of Napoleon in Europe, and to replace natural law understandings with a utilitarian calculus rooted in progressive ideology was institutionalized, most importantly at Harvard Law School. There, Dean Christopher Columbus Langdell instituted the now-standard curriculum of doctrinal courses and replaced reliance on university education with a new “case method.” This method shifted attention away from legal principles and traditions toward the “scientific” parsing of fact patterns and policy decisions in legal decisions were to allow lawyers and judges to “make” new law.

This was part of what Stuart Banner has dubbed *The Decline of Natural Law* (2021). The result was an expansion of lawyers’ power and a pseudo-scientific approach to law aimed at client victory and progressive public policy at the expense of self-government and education aimed at truth and the pursuit of virtue.

Progressive elites’ longstanding campaign to increase their power and control has turned law schools into centers of radical indoctrination and generat-

ed false justifications for lawyers’ and judges’ extension of their influence throughout society. At least since the cynical “legal positivism” of Oliver Wendell Holmes, Jr. banished standards of judicial duty and neutral principles from bench, bar, and academic podium, law schools have been training future lawyers to see America as a failed experiment in what they deem the essential activity of imposing justice through legal activism. The results have been disastrous for law, society, and the pursuit of truth.

None of this is to say that there is no role for lawyers or law schools in a healthy society, or even a healthy educational environment. A law school experience shortened from three to at most two years, focused on the oversight of well-chosen apprenticeships, supplemented by coursework re-establishing an understanding of law’s roots in tradition, guided by cultural practices and philosophical understanding in pursuit of truth, could be a crucial support for a renewal of virtuous self-government. This would require, however, a radical rethinking of the legal academy’s pretensions to policy expertise and special access to understanding of human nature and the social order.

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